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Attorneys for Plaintiff
21 ORACLE AMERICA, INC.

22 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
23 SAN FRANCISCO DIVISION

24 ORACLE AMERICA, INC.,
25 Plaintiff,
26 v.
27 GOOGLE INC.,
Defendant.

Case No. CV 10-03561 WHA
**COMMENT ON TENTATIVE ORDER
CLARIFYING ASSIGNMENT OF RULE
706 EXPERT (ECF 1384)**

1 Subject to Oracle America, Inc.'s ("Oracle") views on and objections to the Rule 706
 2 expert, *see* ECF 1273, 1311, 1340, 1358, 1382, Oracle's comments to the Tentative Order (ECF
 3 1384) are:

- 4 • **Paragraph 4:** Oracle requests that the order make clear that neither party is permitted
 5 to make ex parte substantive communications with Dr. Kearl, any of his assistants, or
 6 his counsel outside the presence of the other party. Substantive communications
 7 include communications regarding Dr. Kearl's role in the case, any witness or expert
 8 testimony, or any expert reports. All written substantive communications Dr. Kearl, his
 9 assistants, or his counsel has with either party shall copy the other party in the same
 10 instance. All verbal substantive communications Dr. Kearl, his assistants, or his
 11 counsel has with either party shall be in the presence of at least one attorney of record
 12 from each side.
- 13 • **Paragraph 5:** Oracle requests that the order make clear that any questioning by Mr.
 14 Cooper at a deposition will not affect the parties' time limits on depositions.
- 15 • **Paragraph 7:** Oracle believes it is premature to issue an order that "Dr. Kearl will
 16 testify at trial" given the Court's statements that it will wait until seeing the expert
 17 reports before making its final decision on whether Dr. Kearl will testify. *See* Nov. 19,
 18 2015 Hr'g Tr. at 11-13; ECF 1383 at 9.
- 19 • **Paragraph 10:** While not expressly stated, Oracle assumes that notice to both parties
 20 will continue to be provided of any communications concerning this case between the
 21 Court and either the Rule 706 expert or his counsel. *See e.g. United States v. Craven*,
 22 239 F.3d 91, 102 (1st Cir. 2001); *Fed. Trade Comm'n v. Enforma Nat. Products, Inc.*,
 23 362 F.3d 1204, 1213 (9th Cir. 2004) (vacating preliminary injunction in part due to the
 24 lack of a record of ex parte communications between the district court and its Rule 706
 25 expert).

1 Dated: December 2, 2015

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6 By: /s/ Peter A. Bicks

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